

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

C.R. JOHNSON COMPANY, INC., KIMCO)	
GROUP, LLC and CHARLES R. JOHNSON)	NO. CV-04-3104-LRS
and KIM M. JOHNSON, husband and)	
wife,)	ORDER GRANTING DEFENDANT'S
)	MOTION FOR SUMMARY JUDGMENT
Plaintiffs,)	
)	
v.)	
)	
CITY OF SELAH,)	
)	
Defendant.)	
)	

BEFORE THE COURT is Defendant City of Selah's Motion For Summary Judgment (Ct. Rec. 31). A hearing was held February 3, 2006. Michael Tierney participated on behalf of the Defendant; Alan Middleton participated on behalf of Plaintiffs.

The facts important to resolution of the issue at hand are not seriously disputed, and will only be abbreviated herein. The subject property, phases 3, 4 and 5 of the plat entitled Charles Johnson Plat number 4, was first proposed for development in 1995 by the owner at the time, Plaintiff C.R. Johnson Company. The initial proposal anticipated the development would go forward in five phases, but Plaintiff C.R. Johnson Company withdrew phases 3, 4, and 5 from the application process. Consequently, only phases 1 and 2 were approved for development in 1995. In 1999, Plaintiff C.R. Johnson Company began the approval process for phases 3, 4, and 5. The proposal went through the first step

1 of the process and received a recommendation for approval from Defendant's
2 planning commission. The proposal, in the form of an application for
3 preliminary plat approval, however, never went to the next step (City
4 Council approval) because of the higher-elevation development moratorium¹
5 enacted by Selah in 1999.

6 Plaintiff C.R. Johnson Company reapplied for preliminary plat
7 approval for phases 3,4 and 5 in 2001. The 2001 application was denied
8 by City Council on July 13, 2001 based upon Defendant Selah's policy
9 against use of booster pumps. Following the action of the City Council
10 in 2001, Plaintiff Charles Johnson was apparently advised to reapply in
11 approximately eighteen months when a new reservoir was expected to be
12 complete.

13 In approximately October 2002, Plaintiff C.R. Johnson Company
14 transferred its interest in the subject property to Plaintiff Kimco Group,
15 LLC ("Kimco"). In 2004, Kimco applied for preliminary plat approval of
16 the subject property. On May 26, 2004, the report prepared by Defendant's
17 staff recommended against approval due to the proposal's reliance on the
18 preexisting Heritage Hills booster pump for its water supply. Defendant's
19 2000 Comprehensive Water Plan made a determination that the Heritage Hills
20 booster pump was sized to accommodate only the 76 connections planned for
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22 ¹ Defendant Selah has a varying topography which affects the water
23 system and has had past problems with booster pumps and water pressure.
24 Prior to 2004, Defendant had two constant pressure booster pumps in
25 operation: the Goodlander Heights pump and the Heritage Hills pump. Due
26 to well-documented difficulties with both booster pumps, Defendant
enacted a moratorium in 1999 on all new subdivisions and made findings
that rapid growth had exhausted its reserve storage capacity and that a
public emergency existed. The moratorium essentially precluded the use
of booster pumps on developments at higher elevations than could be
served by gravity flow systems.

1 Heritage Hills, all of which had originally paid for and installed the
2 booster pump. No appeals or other legal proceedings challenging the
3 actions of the City of Selah were filed thereafter until the late summer
4 of 2004.

5 On June 17, 2004, a public hearing was held regarding the 2004 Kimco
6 proposal. On July 1, 2004, a hearing examiner issued a recommendation to
7 deny preliminary plat approval primarily because of the intention to use
8 Heritage Hills booster pump for its water supply. On July 13, 2004, the
9 City Council considered the Kimco 2004 proposal at a closed record²
10 hearing. The Kimco 2004 application for preliminary plat approval was
11 denied. Kimco appealed the City Council's denial to Superior Court
12 pursuant to Washington's Land Use Procedures Act, R.C.W. 36.70C. The
13 parties to that action then agreed to a stipulated remand from Superior
14 Court back to the City Council on August 16, 2004 to reconsider the denial
15 which had occurred in mid July 2004. On August 24, 2004, City Council
16 approved the KIMCO application for preliminary plat approval, as set forth
17 in Resolution 1548. The Resolution found that circumstances had changed
18 between the date of the findings by the hearing examiner and the date of
19 City Council's reconsideration.

20 The changed circumstances included final resolution of critical
21 issues in the Lookout Point reservoir project. According to the
22 resolution document, Defendant had finalized the location of the storage
23 tank and transmission mains; obtained an easement for construction of the
24 new water tank on June 30, 2004; obtained a quit claim deed for the land
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26 ² The record consisted entirely of the record from the hearing on
June 17, 2004.

1 on which the water tank would be constructed; received issuance of a State
2 Environmental Policy Act (SEPA) preliminary Determination of non-
3 significance regarding the construction of the water tank on July 14,
4 2004; and received issuance of the final SEPA Determination of Non-
5 Significance for construction of the water tank. The reservoir project
6 had finally advanced to become more of a concrete reality after dragging
7 on longer than expected due to difficulties obtaining easements and
8 finding an appropriate site for the storage tank. Plaintiffs filed this
9 suit on August 10, 2004 in state court, which suit was then removed to
10 this court on September 9, 2004.

11 The Court has thoroughly considered the oral and written arguments
12 of counsel, and now enters this order to memorialize and supplement the
13 oral rulings of the Court.

14 **IT IS ORDERED** that:

15 1. Defendant's Motion for Summary Judgment (Ct. Rec. 31) is
16 **GRANTED**.

17 2. The 42 U.S.C. §1983 Claim. Plaintiff Kimco Group, LLC, the
18 property owner with standing during the relevant events not barred by the
19 three year statute of limitations, has failed to state a viable 42 U.S.C.
20 §1983 claim based on procedural or substantive due process or equal
21 protection grounds. The court dismisses the 42 U.S.C. § 1983 claim.

22 3. Federal Procedural Due Process Claim. The procedure by which
23 Defendant denied or approved Plaintiff Kimco's preliminary plat
24 application provided adequate notice and an opportunity to be heard
25 sufficient to meet constitutional requirements, and no material issue of
26 fact is raised suggesting a different result.

1 4. Federal Substantive Due Process Claim. Because the Takings
2 Clause of the United States Constitution provides an explicit textual
3 source of federal constitutional protection against the type of conduct
4 alleged and challenged by the Plaintiffs, that clause preempts the
5 Plaintiffs' substantive due process claim under Federal law. Even in the
6 absence of preemption, Defendant's actions were rationally related to a
7 legitimate state interest, did not deprive Plaintiff Kimco of a
8 particular constitutional guarantee, and are upheld against the
9 substantive due process challenge.

10 5. Equal Rights Violation Claim. Defendant's actions do not
11 involve a suspect classification or implicate a fundamental right.
12 Further, Defendant's actions bear a rational relation to a legitimate
13 state interest and survive constitutional scrutiny for the alleged equal
14 protection violation. The undisputed facts show an ample rational basis
15 for Defendant's response to Kimco's 2004 preliminary plat application to
16 justify any differences between Defendant's response to other proposals.³

17 6. R.C.W. 64.40 Claim. The court exercises supplemental
18 jurisdiction over Plaintiffs' claim under R.C.W. 64.40 and finds that
19 only Plaintiff Kimco has standing to bring such claim based on property
20 ownership during the relevant thirty day time limitation pursuant to
21 R.C.W. 64.40.030. The court further finds that Defendant's July 13, 2004
22 denial of Kimco's 2004 preliminary plat application was not an act that

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24 ³ Plaintiff points to approval of the Orchard Hills subdivision in
25 2005 which calls for a booster pump system on some of the lots to be
26 developed therein. However, the system approved for the development
involved a new multiple pump arrangement which will replace an existing
system with much greater efficiency, dramatic reductions in utility
costs, and elimination of the wasting of 258,000 gallons of water per
month.

1 was arbitrary, capricious, unlawful, or exceeded lawful authority within
2 the meaning of statute. The court dismisses Plaintiffs' claim under
3 R.C.W. 64.40.

4 7. The court acknowledges that under the "vested rights doctrine"
5 recognized in Washington, developers filing a timely and complete land
6 use application obtain a vested right to develop land in accordance with
7 the land use laws and regulations in effect at the time of application.
8 *Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 954 P.2d 250
9 (1998); *Vashon Island Comm. for Self-Gov't v. Boundary Review Bd.*, 127
10 Wash.2d 759, 767-68, 903 P.2d 953 (1995). This case differs from the
11 *Mission Springs* case in several respects. Phases 3, 4, and 5 of the
12 original 1995 application were never approved during the 1995 application
13 process. The problems experienced by the City of Selah (inadequate water
14 supply for fire and domestic purposes, intermittent pump failure, lack
15 of dependability, inordinate maintenance, utility and manpower costs)
16 came to light by the time the 1999 application was initiated. By
17 approving phases 1 and 2 of the original application, the City did
18 nothing to create a vested right concerning additional properties for
19 which the approval process was not pursued in 1995. This is also true
20 of all City actions thereafter until the application was again submitted
21 for consideration in mid 2004.

22 Mere regulation on the use of land has never constituted a
23 "taking" or a violation of due process under federal or state law .
24 *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 327, 787 P.2d 907
25 (1990). The problem in any given case is to determine when such a
26 regulation exceeds constitutional bounds. *Id.* In order to determine

1 whether such a regulation would be unconstitutional either as a "taking"
2 or as a violation of substantive due process, it is necessary to follow
3 the proper tests for inverse condemnation and for substantive due process
4 violations due to excessive land use regulation. *Id.*

5 *Substantive Due Process Under Washington Law* . Washington law
6 requires that the court apply the classic 3-prong due process test and
7 ask: (1) whether the regulation is aimed at achieving a legitimate public
8 purpose; (2) whether it uses means that are reasonably necessary to
9 achieve that purpose; and (3) whether it is unduly oppressive on the land
10 owner. *Id.* at 330 (citations omitted).⁴ Applying the facts of this case
11 to the three-prong test, the court finds no violation of substantive due
12 process. Under the first prong, Defendant's actions were aimed at
13 achieving a legitimate public purpose--adequate fire flow and drinking
14 water for its residents. Under the second prong, plaintiffs' proposals
15 retained use of a preexisting booster pump system found by experience to
16 be inadequate. The determination to preclude or limit use of such
17 systems at higher elevations was therefore not arbitrary or capricious.
18 Additionally, the forty-two day delay in receiving ultimate approval in
19 2004 was not unreasonable. Under the third prong, the moratorium was not
20 unduly oppressive because the scales tip in favor of the public's side

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23 ⁴ In dealing with the issue of "taking," the Washington Supreme
24 Court in *Guimont v. Clarke*, 121 Wash.2d 586, 854 P.2d 1 (1993) retained
25 the *Presbytery* analysis but changed the order of inquiry. If the taking
26 did not destroy a fundamental attribute of ownership such as right to
possess, to exclude others or to dispose of property, no unlawful taking
has occurred and the remaining prongs of the analysis need not be
satisfied. No attribute of ownership as set forth in *Guimont* has been
taken under the facts presented in this case.

1 and against the owner's side.⁵

2 Well-founded public health or safety concerns certainly may
3 supersede vested rights to development. While experts on both sides of
4 the policy and technical issues involving restrictions on the use of
5 booster pumps may fairly arrive at opposing opinions, the City is not
6 required to adopt the developer's viewpoint where it rationally chooses
7 a different alternative, as it did in this case. Further, Defendant
8 bears the responsibility of designing and maintaining a water system for
9 its residents and must carefully scrutinize any infrastructure built by
10 a developer that will ultimately become part of its water system. The
11 Court, therefore, dismisses the substantive due process claim under
12 Washington state law.

13 8. Inverse Condemnation Claim. The court exercises supplemental
14 jurisdiction over Plaintiffs' inverse condemnation claim, the thrust of
15 such claim being a public use taking based on Defendant's actions. The
16 court finds the applicable statute of limitations is ten years under
17 Washington law and that Plaintiffs C.R. Johnson Company and Kimco have
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19 ⁵ The *Presbytery* court listed several nonexclusive factors which
20 should be considered in determining if a regulation is unduly oppressive,
21 such as the nature of the harm, the availability and effectiveness of
22 less drastic measures, and the economic loss suffered by the property
23 owner. *Presbytery*, 114 Wash.2d at 331, 787 P.2d 907. Additional factors
24 involve consideration of both the public's interests and those of the
25 regulated landowner, and include: On the public's side, the seriousness
26 of the public problem, the extent to which the owner's land contributes
to it, the degree to which the proposed regulation solves it and the
feasibility of less oppressive solutions would all be relevant. On the
owner's side, the amount and percentage of value loss, the extent of
remaining uses, past, present and future uses, temporary or permanent
nature of the regulation, the extent to which the owner should have
anticipated such regulation and how feasible it is for the owner to alter
present or currently planned uses. *Sintra, Inc. v. City of Seattle*, 119
Wash.2d 1, 829 P.2d 765, 776-77(1992)(citations omitted).

1 standing based on their property ownership during the relevant time
2 frame. The court does not find that the elements of an inverse
3 condemnation claim are met under *Phillips v. King Cy.*, 136 Wn.2d 946,
4 957, 968 P.2d 871 (1998). The court finds an absence of damage that is
5 permanent or recurring or that involves a chronic or unreasonable pattern
6 of behavior by the Defendant government. See *Pruitt v. Douglas County*,
7 116 Wn.App. 547, 560, 66 P.3d 1111 (2003) (quoting *Gaines v. Pierce*
8 *County*, 66 Wn.App. 715, 725-26, 834 P.2d 631 (1992)). The Court
9 dismisses the inverse condemnation claim.

10 **IT IS SO ORDERED.**

11 The District Court Executive is directed to file this Order, enter
12 judgment in favor of the Defendant, and provide copies to counsel.

13 **DATED** this 10th day of February, 2006.

14 *s/ Lonny R. Suko*

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16 LONNY R. SUKO
17 UNITED STATES DISTRICT JUDGE
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